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Adjustable Rate Mortgages Trust 2007-1, Mortgage Pass-Through Certificates,
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

VIRGINIA DEL REY,

Plaintiff,

vs.

U.S. Bank National Association as Trustee
for MASTR Adjustable Rate Mortgages
Trust 2007-1, Mortgage Pass-Through
Certificates, Series 2007-1, OCWEN Loan
Servicing, LLC, Western Progressive, LLC,
and DOES 1-10 inclusive,

Defendants.

Case No.: 3:13-cv-03170-L-WMC

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT
[F.R.C.P. 12(b)(6)]**

Date: March 10, 2014

Time: 10:30 A.M.

Ctrm.: 5B

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, who has defaulted on her mortgage loan five times in the last five years, brings this Complaint on the eve of foreclosure, alleging that Defendants lack the authority to foreclose. As legal support for her claim that Defendants lack the authority to foreclose, Plaintiff cites *Glaski v. Bank of America, N.A.* Since its publication earlier this year, *Glaski* has been criticized as “unpersuasive,” “a clear minority” and based on “a questionable interpretation” of the law. Further, every district court in the state of California has declined to follow the holding in *Glaski*. Because Plaintiff’s entire Complaint relies on a case widely regarded as improperly decided, it should be dismissed in its entirety.

Moreover, each of Plaintiff’s claims fail for separate and independent reasons. Plaintiff’s Negligence claim fails because Defendants do not owe her any duty. Plaintiff cannot allege a Quasi Contract claim because a valid contract already exists governing the parties’ rights and responsibilities. Plaintiff’s Unfair Debt Collection claim fails because these Defendants are not debt collectors. Plaintiff fails to state adequate facts supporting any unfair, unlawful, or fraudulent conduct by these Defendants and therefore her claim for Violation of Business and Professions Code § 17200 fails. Plaintiff cannot state an Accounting claim because no fiduciary relationship exists between herself and these Defendants, and she

1 cannot state a claim for Cancellation of Instruments because she has not been
2 prejudiced. Plaintiff's Quiet Title Claim fails as a matter of law because there is no
3 title instrument to challenge. Finally, Plaintiff's Declaratory Relief claim is
4 duplicative and therefore should be dismissed.
5

6 For the foregoing reasons, this Court should grant Defendants' Motion to
7 Dismiss without leave to amend because the Complaint in its entirety fails to state
8 a claim.
9

10 **II. STATEMENT OF FACTS**

11 On October 2, 2006, Plaintiff, Virginia Del Rey purchased the real property
12 located at 543 Camino De Orchida, Encinitas CA 92024 ("Property"). (RJN, Exh.
13 A.) The Deed of Trust lists MERS as "the beneficiary under this Security
14 Instrument," American Brokers Conduit as the lender, and Chicago Title Company
15 as the trustee. (*Id.*) The Deed of Trust was recorded in the San Diego County
16 Recorder's Office ("Recorder's Office") on October 6, 2006. (*Id.*)
17

18 Two years later, in 2008, Plaintiff defaulted on her loan. As a result,
19 foreclosure proceedings commenced and a Notice of Default was recorded on
20 December 18, 2008. RJN Exhibit B.
21

22 In 2009, Plaintiff defaulted for the second time, and a Notice of Default was
23 recorded on August 28, 2009. RJN Exhibit C.
24

25 In 2010, Plaintiff defaulted for the third time, and a Notice of Default was
26

1 recorded on April 7, 2010. RJN Exhibit D.

2 An Assignment of the Deed of Trust was recorded on July 22, 2010,
3 assigning the beneficial interest to U.S. Bank National Association, as Trustee for
4 MASTR Adjustable Rate Mortgages Trust 2007-1, Mortgage Pass-Through
5 Certificates, Series 2007-1. RJN Exhibit E.

6
7 In 2012, Plaintiff defaulted for the fourth time, and a Notice of Default was
8 recorded on February 8, 2012. RJN Exhibit F.

9
10 In 2013, Plaintiff defaulted for the fifth time, and a Notice of Default was
11 recorded on June 7, 2013. RJN Exhibit G.

12
13 Plaintiff failed to cure her default, and a Notice of Trustee Sale was
14 recorded on September 26, 2013, setting the sale of the Subject Property for
15 October 25, 2013. RJN Exhibit H.

16
17 On October 23, 2013, just two days before the foreclosure sale of the
18 Subject Property, Plaintiff filed this lawsuit in the Superior Court of California for
19 the County of San Diego, alleging that the Assignment of the Deed of Trust
20 recorded three years prior was improper and therefore the foreclosure should be
21 stopped. RJN Exhibit I.

22
23 Defendants removed this matter to this Court on December 27, 2013.

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1 **III. ARGUMENT**

2 **A. Plaintiff Lacks Standing to Challenge U.S. Bank, as Trustee's**

3 **Authority to Foreclose.**

4
5 Plaintiff's entire Complaint is predicated on her allegation that her note and
6 deed of trust were not properly securitized and therefore U.S. Bank, as Trustee,
7 lacks the authority to initiate foreclosure proceedings. However, Plaintiff lacks
8 standing to challenge Defendant's ability to foreclose.

9
10 Section 2924 of the California Civil Code is the comprehensive framework
11 governing non-judicial foreclosures. Nowhere does the statute provide for a
12 judicial action to determine whether the person initiating the foreclosure process is
13 indeed authorized. *Gomes v. Countrywide Home Loans, Inc.*, (2011) 192
14 Cal.App.4th 1149, 1155. The recognition of the right to bring a lawsuit to determine
15 a parties authorization to proceed with foreclosure on behalf of the noteholder
16 would fundamentally undermined the nonjudicial nature of the process and
17 introduce the possibility of lawsuits filed solely for the purpose of delaying valid
18 foreclosure. *Id.*

19
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22 Plaintiff's Complaint alleges that because the Assignment of the Deed of
23 Trust was executed and recorded after the Pooling and Servicing Agreement's cut-
24 off date, her Note and Deed of Trust never became part of the Trust. Complaint ¶
25 50. Plaintiff challenges U.S. Bank, as Trustee's ability to foreclose on this basis.

1 *Id.* As the Court found in *Gomes*, the Plaintiff here does not have standing to
2 challenge Defendant's ability to foreclose on the Subject Property. The recognition
3 of such a right to bring a lawsuit to determine a parties authorization to proceed
4 with foreclosure on behalf of the noteholder would fundamentally undermined the
5 nonjudicial nature of the process and encourage more lawsuits, like the present
6 one, filed solely for the purpose of delaying or setting aside a valid foreclosure.
7
8

9 Plaintiff relies on the recently decided *Glaski v. Bank of America, N.A.*,
10 (2013) 218 Cal.App.4th 1079, for the proposition that she has standing to contest
11 the legitimacy of securitization of her Note and Deed of Trust. Complaint ¶ 14, fn
12 2. In *Glaski*, the Court of Appeal held that a borrower under a trust deed had
13 standing to challenge the foreclosure under the basis that the assignments of the
14 loan were void and thus that the foreclosure was not conducted at the direction of
15 the correct party. *Glaski v. Bank of America, N.A.*, (2013) 218 Cal.App.4th 1079,
16 1097. A plaintiff asserting this theory must allege facts that show the defendant
17 who invoked the power of sale was not the true beneficiary. *Id* at 1094.
18
19
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21 Here, Plaintiff fails to allege facts which show U.S. Bank, as Trustee, is not
22 the true beneficiary. Instead, Plaintiff simply concludes without factual support
23 that Defendant lacks the authority to foreclose because the Assignment is
24 "blatantly fabricated." Compl. ¶ 25. Plaintiff fails to provide any factual support
25 for this conclusion. Accordingly, Plaintiff cannot challenge the foreclosure on the
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1 basis that the assignment was void.

2 Moreover, in the days since the decision in *Glaski*, Unites States District
3 Courts in the Southern, Eastern, and Northern Districts of California have all
4 declined to follow the holding. The Court in *Newman v. Bank of New York Mellon*
5 declined to follow *Glaski*'s holding that a borrower has standing to assert a
6 violation of a PSA and stated that "*Glaski* is in a clear minority on the issue."
7
8 *Newman v. Bank of New York Mellon*, 1:12-CV-1629 AWI, 2013 WL 5603316
9 (E.D. Cal. Oct. 11, 2013). *In re Sandri* held that "*Glaski* is inconsistent with the
10 majority line of cases and is based on a questionable analysis of New York trust
11 law." *In re Sandri*, 2013 WL 5925655 (Bankr. N.D. Cal. Nov. 4, 2013). Similarly,
12 in the case of *Diunugala v. JP Morgan Chase*, the Court stated it found *Glaski* to
13 be unpersuasive, and instead relied on the holding in *Gomes* and its progeny in
14 ruling that Plaintiff failed to adequately allege standing to challenge an assignment
15 that purportedly violated a PSA. *Diunugala v. JP Morgan Chase Bank, N.A.*,
16 12CV2106-WQH-NLS, 2013 WL 5568737 (S.D. Cal. Oct. 3, 2013).

17
18 Because *Glaski* has received such negative treatment from the District
19 Courts in California and because it is inconsistent with the clear line of majority
20 cases on the issue, this Court should decline to follow its holding.

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1 **B. Plaintiff's Claim for Negligence Fails.**

2 **1. Defendants Do Not Owe Plaintiff a Special Duty**

3 Plaintiff's Negligence claim fails because, as a matter of law, Defendants do
4 not owe her a tort duty of care.

5 To maintain a cause of action for negligence, a plaintiff must show a legally
6 cognizable duty owed by defendant to plaintiff. *Merrill v. Navegar* (2001) 26
7 Cal.4th 465, 500. A financial institution owes no tort duty to its borrower when its
8 involvement in the loan transaction does not exceed the scope of its traditional role
9 as lender. *Nymark v. Hart Federal Sav. & Loan Ass'n* (1991) 231 Cal.App.3d
10 1089, 1096. This same rule applied in *Nymark* applies to loan servicers, such as
11 Ocwen. *Watts v. Decision One Mortg. Co.*, No. 09-43 2009 U.S. Dist. LEXIS
12 59694 (S.D. Cal. July 13, 2009); *Marks v. Ocwen Loan Servicing*, No. 07-2133,
13 2009 WL 975792, at *7 (N.D. Cal. Apr. 10, 2009) (“[A] loan servicer does not owe
14 a fiduciary duty to a borrower beyond the duties set forth in the loan contract.”)
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19 Plaintiff's Complaint alleges that “USBNA has a duty to exercise reasonable
20 care and skill to refrain from taking any action against Plaintiff that they do not
21 have the legal authority to do.” Compl. ¶ 102. Plaintiff does not allege that either
22 US Bank, as Trustee, or Ocwen, exceeded their traditional role as lender and
23 servicer, respectively. See Complaint Generally. Instead, the actions Plaintiff
24 complains of concern the collection of her mortgage payments, credit reporting to
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1 credit bureaus, accounting of her loan, and the foreclosure of her delinquent
 2 account (Compl. ¶ 101); all of which are traditional duties of lenders and servicers.
 3 Accordingly, these Defendants do not owe a tort duty of care to Plaintiff.
 4

5 As no duty or special relationship exists between Plaintiff and Defendants, a
 6 cause of action for negligence has not, and cannot, be stated. Accordingly,
 7 Plaintiff's Negligence claim should be dismissed.
 8

9 **2. Plaintiff Is Not Entitled to the Remedy She Seeks.**

10 Plaintiff's Negligence claim fails because she fails to allege that Defendants'
 11 conduct caused her any recoverable damages.
 12

13 To maintain a cause of action for negligence, a plaintiff must show a
 14 resulting injury to the plaintiff. *Merrill v. Navegar* (2001) 26 Cal.4th 465, 500. "If
 15 the allegedly negligent conduct does not cause damage, it generates no cause of
 16 action in tort. The mere breach of a ... duty, causing only nominal damages,
 17 speculative harm, or the threat of future harm — not yet realized — does not
 18 suffice to create a cause of action for negligence." *Budd v. Nixen*, (1971) 6 Cal. 3d
 19 195, 200, *superseded, in part, by statute in Laird v. Blacker*, (1991) 229 Cal. App.
 20 3d 159. A plaintiff may only seek remedies for negligence for physical injury to
 21 person or property, and not for purely economic loss. *Cal. Dep't of Toxic*
 22 *Substances Control v. Payless Cleaners* (2005) 368 F. Supp. 2d 1069, 1084.
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26 Here, Plaintiff's only alleged harm is "general and special damages in an
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amount to be determined at trial, including attorney's fees, and costs of bringing suit to dispute, validate, and challenge said Defendant's purported rights to enforce her debt obligations against her." Compl. ¶ 104. This is patently economic (not physical) harm that does not give rise to negligence remedies. Further, Plaintiff cannot allege that the foreclosure caused her any damages, as the sale has not yet occurred and thus any damages would be purely speculative or based on the threat of a future harm.

Irrespective of duty, Plaintiff's negligence claim fails because she has not alleged actual damages.

C. Plaintiff's Claim for Quasi Contract Fails

Plaintiff cannot collect restitution for payments made pursuant to a valid deed of trust.

As a matter of law, a quasi-contract action for unjust enrichment does not lie where express binding agreements exist and define the parties' rights. *California Medical Ass'n, Inc. v. Aetna U.S. Healthcare of California, Inc.* (2001) 94 Cal. App. 151, 172-173.

"When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract." *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal. App. 4th 1410, 1420. In *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, the appellate court stated: "There cannot be a valid express contract and an implied

1 contract, each embracing the same subject, but compelling different
2 results.” (Id. at p. 1387).

3 Plaintiff is attempting to collect restitution and unjust enrichment via a
4 quasi-contract theory for previous mortgage payments she made pursuant to a valid
5 Deed of Trust (Comp., ¶ 106; RJN, Exh. 1). Plaintiff alleges that “there is no
6 contract of any kind as between the Plaintiff and the Defendant USBNA,” Compl.
7 ¶ 10. However, an express binding contract (the Note and Deed of Trust) exists
8 which defines Plaintiff’s rights with regard to any payments made to Defendants.
9 Accordingly, because Plaintiff signed an express binding agreement, Plaintiff’s
10 claim for quasi-contract fails in its entirety and should be dismissed with prejudice.
11
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13 **D. Plaintiff’s Claim for Violation of 15 U.S.C. 1692, et. seq. Fails.**

14 Plaintiff alleges that U.S. Bank, as Trustee has violated the Fair Debt
15 Collection Practices Act (“FDCPA”) and is therefore subject to penalties.
16 However, U.S. Bank, as Trustee, is not a “Debt Collector” under the FDCPA and
17 therefore cannot be held liable under the Act.
18
19

20 A debt collector, as defined by 15 U.S.C. § 1692a(6), means any person who
21 “regularly collects or attempts to collect, directly or indirectly, debt owed or due to
22 another.” “Creditors” are not considered debt collectors. The creditor exception
23 under 15 U.S.C. § 1692a(6) states that creditors collecting their own consumer
24 debts and the creditor’s, officers or employees collecting debts on the creditor’s
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26

1 behalf are not debt collectors. Further, “[t]he law is well-settled that creditors,
 2 mortgagors and mortgage service companies are not debt collectors and are
 3 statutorily exempt from liability under the FDCPA.” *Angulo v. Countrywide Home*
 4 *Loans, Inc.*, 2009 WL 3427179 at *5 (E.D. Cal. Oct. 26, 2009) (citing *Nera v. Am.*
 5 *Home Mortg. Servicing, Inc.*, 2009 WL 2423109 (N.D. Cal. Aug. 4, 2009);
 6 *Constantini v. Wachovia Mortg. FSB*, 2009 WL 1810122 (E.D. Cal. June 23,
 7 2009); *Hepler v. Washington Mut. Bank, F.A.*, 2009 WL 1045470 (C.D. Cal. Apr.
 8 17, 2009); *Pineda v. Saxon Mortg. Servs.*, 2008 WL 5187813 (C.D. Cal. Dec. 10,
 9 2008).

10 Defendant was and is a creditor collecting the debt by non-judicial
 11 foreclosure of a Deed of Trust. Defendant is exempt under the FDCPA. U.S.
 12 Bank, as Trustee is not a debt collector under the FDCPA by virtue of its status as
 13 a creditor. *See Angulo*, 2009 WL 3427179 at *5. As US Bank, as Trustee is not a
 14 debt collector, it cannot be held liable under the FDCPA. Accordingly, Plaintiff’s
 15 claim fails.

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 21 **E. Plaintiff’s Claim for Violation of California Business and**
 22 **Professions Code § 17200 Fails.**

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 25 **1. Plaintiff Fails to Allege a Violation of any “Borrowed Law”**
to Support Her Unfair Business Practices Claim.

26 Plaintiff fails to adequately allege a violation of any law to support her
 27

1 claim for unlawful business practices.

2 An act is “unlawful” under the UCL if it violates an underlying state or
3 federal statute or common law. *Cel-Tech Communications, Inc. v. Los Angeles*
4 *Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999); see also *Morgan v. AT&T Wireless*
5 *Services, Inc.*, 177 Cal.App.4th 1235 (2009).
6

7 Here, the laws Plaintiff claims Defendants have violated are 12. U.S.C.
8 2605(e) and 18 U.S.C. 1951(b)(2). Compl. ¶¶ 111-112. 12 U.S.C. 2605(e)
9 imposes a duty upon Loan Servicers to respond to a borrower’s inquiry, and 18
10 U.S.C. 1951(b)(2) is a federal extortion statute. No private right of action exists
11 under 18.U.S.C 1951. *Wisdom v. First Midwest Bank, of Poplar Bluff*, (1999)
12 167 F.3d 402.
13

14 Plaintiff alleges Defendants violated 12. U.S.C. 2605(e) and 18 U.S.C.
15 1951(b)(2) when they engaged in unlawful actions in connection with the
16 recording of the Assignment of the Deed of Trust and attempts to enforce the debt.
17 Compl. ¶ 116. Recording of an Assignment of the Deed of Trust and attempting to
18 enforce a debt are not violations of 12. U.S.C. 2605(e). Plaintiff does not state any
19 facts which demonstrate that Ocwen, as Servicer, failed to respond to an inquiry
20 she made under 12. U.S.C. 2605(e). Compl. ¶ 110-124. Further, no private right of
21 action exists which would allow her to make any claim under 18 U.S.C.
22 1951(b)(2). Finally, her claim fails to state any facts which would show the claim
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1 is based on her other causes of action which have been shown to fail.
 2 Accordingly, Plaintiff cannot allege a claim arising under the “unlawful” prong of
 3 section 17200.
 4

5 **2. Plaintiff Fails to State a Claim Under the “Unfair” Prong.**

6 Plaintiff fails to state adequate facts to support her claim for unfair business
 7 practices.
 8

9 A business practice is “unfair” if it violates an “established public policy or
 10 the practice is immoral, unethical, oppressive, unscrupulous, or substantially
 11 injurious to consumers.” *Community Assisting Recovery, inc. v. Aegis Security*
 12 *Ins. Co.*, 92 Cal.App.4th 886 (2001). The “unfair” prong requires that:
 13

14 [A]ny finding of unfairness to competitors under section 17200 [must]
 15 be tethered to some legislatively declared policy or proof of some
 16 actual or threatened impact on competition. We thus adopt the
 17 following test: When a plaintiff who claims to have suffered injury
 18 from a direct competitor's “unfair” act or practice invokes section
 19 17200, the word “unfair” in that section means conduct that threatens
 20 an incipient violation of an antitrust law, or violates the policy or
 spirit of one of those laws because its effects are comparable to or the
 same as a violation of the law, or otherwise significantly threatens or
 harms competition.

21 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.
 22 4th 163, 186-187 (1999). “A plaintiff alleging unfair business practices under
 23 these statutes must state with reasonable particularity the facts supporting the
 24 statutory elements of the violation.” *Khoury v. Maly's of California, Inc.*, 14 Cal.
 25 App. 4th 612, 619 (1993) (citations and quotations omitted).
 26

Plaintiff lumps all defendants together to allege that they have engaged in “unfair” acts in violation of Business and Professions Code section 17200. Comp., ¶¶ 110-124. Further, Plaintiff’s allegations regarding how Defendants acted unfairly all rely on her speculative conclusion that Defendants lacks standing to foreclose. Compl. ¶ 116. Such speculation is insufficient to state a claim for unfair business practices. Plaintiff fails to allege any conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws, or otherwise significantly threatens or harms competition. *Id.* Plaintiff fails to allege who Defendants’ competitors are or how any competition is threatened. *Id.* Thus, Plaintiff’s claim fails and should be dismissed with prejudice.

3. Plaintiff Fails to State a Claim Under the “Fraudulent” Prong.

To the extent that Plaintiff’s Section 17200 claim rests on the “fraudulent” prong of the statute, it also fails to state a claim for relief because it lacks the requisite specificity.

The “fraudulent” prong under the UCL requires a plaintiff to “show deception to some members of the public, or harm to the public interest,” *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, (2001) 178 F.Supp.2d 1099, 1121, or to allege that “members of the public are likely to be deceived,” *Medical*

1 *Instrument Development Laboratories v. Alcon Laboratories*, 2005 WL 1926673,
2 at *5 (N.D.Cal.2005). Furthermore, allegations of fraudulent conduct under
3 Section 17200 must satisfy the heightened pleading requirements of FRCP 9(b).
4 Also, in a fraud action against a corporation, “a plaintiff must allege the names of
5 the person who made the allegedly fraudulent misrepresentations, their authority to
6 speak, to whom they spoke, what they said or wrote, and when it was said or
7 written.” *Macris v. Bank of America, N.A.*, 2012 WL 273120 *11–12 (E.D.Cal.
8 Jan. 30, 2012) (quoting *Tarmann v. State Farm Mut. Auto. Ins. Co.*, (1991) 2
9 Cal.App.4th 153, 157.

10 Plaintiff’s allegations of fraudulent conduct range from fraudulently
11 recording “documents” to “acting as a beneficiary without the authority to do so.”
12 Complaint ¶ 116. Plaintiff fails to differentiate between defendants or provide any
13 specificity regarding the conduct complained of. The allegations in Plaintiff’s
14 Complaint fail to specify the “who, what, when, where, and how of the misconduct
15 charged” in accordance with Fed.R.Civ.P. 9(b). *Kearns v. Ford Motor Co.*, 567
16 F.3d 1120, 1124 (9th Cir. 2009). These allegations are far too vague to satisfy the
17 pleading standards applicable to fraud.

18 Plaintiff fails to adequately allege unlawful, unfair, or fraudulent business
19 practices by Defendants to state a claim for Violation of § 17200. Accordingly, this
20 claim should be dismissed.

4. Plaintiff Lacks Standing

Plaintiff lacks standing to pursue a cause of action for violation of Business and Professions Code section 17200.

A private person has standing to assert a section 17200 claim only if he (1) “has suffered injury in fact,” and (2) “has lost money or property *as a result of* such unfair competition.” Cal. Bus. & Prof. Code § 17204 (emphasis added). Plaintiff cannot maintain an action unless he establishes a loss of money or property that was caused by the defendant’s business practice. *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322. Plaintiff has not identified any injury in fact that would be sufficient to confer standing under section 17200.

In an attempt to show injury, the Complaint alleges only Plaintiff has been injured in that a cloud has been placed on title to Plaintiff’s Property. Compl. ¶ 123. Although it is unclear from Plaintiff’s Complaint, Defendants assume the “cloud” Plaintiffs refer to is the commencement of foreclosure proceedings by the recording of the Notice of Default. However, the commencement of foreclosure is not an injury in fact that was *caused* by any specific conduct of these Defendants. This is especially true in light of Plaintiff’s admission that she owes money on the loan. Compl. ¶ 27. Because the foreclosure directly resulted from Plaintiff’s failure to make required payments on the loan, she cannot show that her purported injury was actually caused by Defendants’ conduct. Without facts demonstrating

1 injury in fact or causation, Plaintiff cannot pursue a cause of action under section
2 17200.

3
4 **F. Plaintiff's Claim for Accounting Fails.**

5 Plaintiff cannot state a claim for an Accounting because she owes
6 Defendants money, not the other way around, and there is no fiduciary
7 relationship as a matter of law between Plaintiff and Defendants.
8

9 To state a claim for accounting, a plaintiff must plead that (1) it is entitled
10 to damages from the defendant under some other cause of action, (2) the amounts
11 owing the defendant to the plaintiff cannot be determined without an accounting
12 by the defendant, and (3) a fiduciary relationship exists between the defendant and
13 the plaintiff requiring the defendant to render such an accounting. *St. James*
14 *Church of Christ Holiness*, (1955) 135 Cal.App.2d 352, 359. Generally, there is
15 no fiduciary duty between a lender and borrower. *Perlas v. GMAC Mortg., LLC*,
16 (2010) 187 Cal. App. 4th 429, 436 .
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19 Any other duty to provide an accounting only arises when a written request
20 for one is made prior to the Notice of Default being recorded (California Civil
21 Code § 2943(c)).
22

23 Plaintiff does not state that she is entitled to damages from Defendants
24 under some other cause of action. See Compl. Generally. Plaintiff alleges that the
25 amount of money owed on the mortgage is unknown and cannot be determined
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27

1 without an accounting. Compl. ¶ 128. However, Plaintiff admits that she “does not
 2 dispute that she owed money on her mortgage obligation.” Compl. ¶27. This is not
 3 a situation in which Defendants are liable for various sums of money and Plaintiff
 4 does not know what money is due to her. Plaintiff is the one who owes Defendants
 5 money, not vice versa. This cause of action is also not available to Plaintiff
 6 because it is well established that there is no fiduciary relationship between a
 7 borrower and a lender or loan servicer. Plaintiff has failed to provide any facts
 8 which would establish a fiduciary relationship between herself and U.S. Bank, as
 9 Trustee, or Ocwen. See Complaint Generally.

13 Further, Plaintiff fails to provide any evidence, or even allege, that she
 14 timely requested a beneficiary statement before the Notice of Default recorded in
 15 June of 2013. See Compl. ¶¶ 125-28. Accordingly she cannot state a cause of
 16 action for an accounting pursuant to Cal. Civ. Code § 2943 (c).

18 Thus, Plaintiff is barred from asserting a claim for Accounting.

19 **G. Plaintiff’s Claim for Cancellation of Instrument Fails.**

20 **1. Plaintiff Cannot Predicate a Viable Claim Based on Her**
 21 **Allegation that Defendants Lack the Authority to Foreclose.**

22 Plaintiff lacks standing to challenge the instruments she seeks to cancel.

23 Section 2924 of the California Civil Code is the comprehensive framework
 24 governing non-judicial foreclosures. Nowhere does the statute provide for a
 25

1 judicial action to determine whether the person initiating the foreclosure process is
2 indeed authorized. *Gomes v. Countrywide Home Loans, Inc.*, (2011) 192
3 Cal.App.4th 1149, 1155. The recognition of the right to bring a lawsuit to determine
4 a parties authorization to proceed with foreclosure on behalf of the noteholder
5 would fundamentally undermine the nonjudicial nature of the process and
6 introduce the possibility of lawsuits filed solely for the purpose of delaying valid
7 foreclosure. *Id.*

10 Plaintiff seeks to cancel the Notice of Default and Notice of Trustee Sale
11 based on her allegation that those documents are improper since U.S. Bank, as
12 Trustee, has no authority to foreclose. Comp. ¶ 130. However, Plaintiff lacks
13 standing to challenge U.S. Bank, as Trustee's authority to foreclose. The
14 recognition of such a right to bring a lawsuit to determine a parties authorization to
15 proceed with foreclosure on behalf of the noteholder would fundamentally
16 undermine the nonjudicial nature of the process and encourage more lawsuits, like
17 the present one, filed solely for the purpose of delaying or setting aside a valid
18 foreclosure. Accordingly, Plaintiff cannot state facts which would show these
19 documents' apparent validity and their actual invalidity.

23 **2. Plaintiff Cannot Show Prejudice**

24 Plaintiff cannot set aside these foreclosure documents because she cannot
25 show that she has been prejudiced by them.

1 The California Court of Appeal has held that plaintiffs must “allege...facts
2 showing that they suffered prejudice as a result of any lack of authority of the
3 parties participating in the foreclosure process.” *Siliga v. Mort. Elec. Reg. Sys, Inc.*,
4 (2013) 219 Cal.App.4th 75,161. Courts have rejected claims of defective
5 foreclosure process where no prejudice was suffered as the result of a procedural
6 irregularity. *Pantoja v. Countrywide Home Loans Inc.*, 640 F.Supp.2d 1177, 1186
7 (N.D.Cal., 2009) (citing to *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 94).

10 Here, Plaintiff alleges that if the Notice of Default and Notice of Trustee
11 Sale are not cancelled, she faces the loss of title and possession of her property.
12 Compl. ¶ 133. However, Plaintiff does not dispute that she is in default under the
13 note. Compl. ¶ 27. Therefore, the commencement of foreclosure and the recording
14 of these documents have not unfairly prejudiced her because she defaulted on her
15 loan. There is no reason to believe that any lender would have refrained from
16 foreclosure in these circumstances. Accordingly, Plaintiff fails to allege she
17 suffered any prejudice from the Assignment or the Notice of Default and Notice of
18 Sale that followed. Absent any prejudice, Plaintiff cannot cancel these documents
19 and her claim for Cancellation of Instruments should be dismissed.

23 **H. Plaintiff’s Claim for Quiet Title Fails.**

24 Plaintiff’s Quiet Title Claim fails as a matter of law because there is no title
25 instrument to challenge.
26

1 An action for Quiet Title may be brought “to establish title against adverse
2 claims to real or personal property or any interest therein.” *Cal. Civ. Proc.* §
3 760.020. The purpose of pursuing a Quiet Title action is the Plaintiff’s desire to
4 have conflicting claims against an interest in property settled. *Baucum v. Le Baron*
5 (1955) 136 Cal. App. 2d 593, 595 (“It is now well settled that the court may finally
6 determine as between the parties in a quiet title action all of the conflicting claims
7 regarding any estate or interest in the property.”). To Quiet Title, the Complaint
8 must state facts which show a title instrument’s apparent validity but actual
9 invalidity. *See Hughes v. Beekley* (1927) 85 Cal. App. 313, 316.

10 Plaintiff’s claim for Quiet Title is at best *premature* in that there has been no
11 foreclosure sale of the Subject Property removing ownership interests from
12 Plaintiff. RJN Exhibits A-I. While foreclosure was initiated, it has not been
13 completed, and title remains vested within Plaintiff. Accordingly, there is no *title*
14 *instrument* to challenge as no sale has removed chain of title from vesting in
15 Plaintiff’s name.

16 As there has been no sale of the Subject Property, there is no legal basis for
17 Plaintiff’s claim for Quiet Title.

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23 **I. Plaintiff’s Claim for Declaratory Relief Fails**

24 Plaintiff’s claim for Declaratory Relief is based on allegations that
25 Defendants are not the assignees of the Note which is duplicative, improper,
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unnecessary, and must be dismissed without leave to amend.

A district court may exercise its jurisdiction over a claim pursuant to the Declaratory Judgment Act (“DJA”), “[i]n a case of actual controversy within its jurisdiction.” 28 U.S.C. § 2201. The DJA is merely procedural; it does not provide a theory of recovery. *Rendon v. Countrywide Home Loans*, 2009 U.S. Dist. LEXIS 88047, *36 (E.D. Sept. 23, 2009). An action is only appropriate “if there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of declaratory judgment.” *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669-71 (9th Cir. 2001). Furthermore, a declaratory judgment is unnecessary when an adequate remedy exists under other causes of action. *Mangindin v. Wash. Mut. Bank*, 2009 U.S. Dist. LEXIS 51231, *13 (N.D. June 18, 2009).

Plaintiff’s Declaratory Relief claim is entirely commensurate with relief sought through her seven causes of action, none of which state a viable claim for relief. In requesting the court to make a declaration of her rights, Plaintiff is merely reiterating the claims in her other causes of action. More specifically, that Defendants lack authority to foreclose because they have no interest in the Note or Deed of Trust. Complaint ¶ 92.

Accordingly, Plaintiff’s Declaratory Relief claim is duplicative and fails to state a claim for relief.

1 **IV. CONCLUSION**

2 For the reasons set forth above, Defendants respectfully request that the
3 Court grant this motion and dismiss Plaintiff's Complaint with prejudice, and for
4 such further relief as this Court deems just and proper.
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7 DATED: January 2, 2013

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9
10 /s/ Jessica L. Yared

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